IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 546

WALTER T. GUNN,

Petitioner,

vs.

VINCENT Y. DALLMAN, Individually and as Collector of Internal Revenue for the 8th Collection District of Illinois,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION.

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PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Walter T. Gunn, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming a judgment of the United States District Court for the Southern District of Illinois, Southern Division.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner is a Judge of the Supreme Court of the State of Illinois. He brought this action against respondent to recover over-payments of Federal Income Taxes for the six years 1939-1944 on the ground that his statutory judicial salary was wrongfully included in his taxable income for those years. The District Court on defendant's motion dismissed petitioner's amended complaint on the ground that it failed to state a claim on which relief could be granted. The lower court's judgment was affirmed by the Court of Appeals.

The issue in the lower courts and the one which will be presented to this Court if certiorari is granted is whether or not the complaint states a cause of action. Based on the allegations of the complaint, which are admitted by the motion to dismiss as far as this issue is concerned, the material facts are as follows:

Petitioner took office as a Judge of the Supreme Court of Illinois on July 1, 1938. Commencing with the year 1939, petitioner's statutory judicial compensation was included over his protest in his taxable income under the Public Salary Tax Act of 1939. This statutory compensation was paid to him by virtue of his judicial office created by the Constitution of Illinois which also provides that after the salaries of the judges holding such office have been fixed by law they shall not be increased or diminished during the term for which the judges are elected. Petitioner paid taxes on his judicial salary for the six years 1939-1944 and duly filed his claims for refunds.

No part of his claims have ever been refunded or credited to petitioner nor has any notice of disallowance of his claims been sent to petitioner in accordance with Section 3772 (a) (2) of the Internal Revenue Code. The complaint alleged that the inclusion of petitioner's judicial salary in his taxable income was erroneous and contrary to law, setting forth reasons which are fully discussed later in this petition and in the supporting brief.

JURISDICTION.

The decision of which this petitioner seeks review by writ of certiorari is that of the United States Court of Appeals for the 7th Circuit entered on November 30, 1948. The jurisdiction of this court is invoked under Title 28, U. S. Code, Sections 1254 and 2101.

QUESTIONS PRESENTED.

The questions presented in this cause are:

1. Whether plaintiff is entitled to recover the tax previously paid by him to defendant because of the inclusion in plaintiff's taxable income of his salary as a Judge of the Supreme Court of Illinois in computing the amount of income tax paid by him for the years 1939 to 1944, both inclusive.

2. Whether the taxation of plaintiff's salary as a Judge of the Supreme Court of Illinois is an invasion of the sovereign power of the State of Illinois and a direct burden on an indispensable agency of the State of Illinois.

3. Whether the taxation of plaintiff's salary as a Judge of the Supreme Court of the State of Illinois

is a violation of the constitutional immunity of the State of Illinois from taxation by the federal government.

4. Whether the taxation of plaintiff's salary results in a diminution of his salary contrary to the provisions of Article VI, Section 7 of the Constitution of the State of Illinois.

5. Whether the amendment to Section 22a of the Internal Revenue Code made by the Public Salary Tax Act of 1939 (26 U. S. C., Sec. 22(a)) is unconstitutional and void because it attempts to tax the salary of a constitutional officer of the State of Illinois.

6. Whether the taxation of plaintiff's salary as a Judge of the Supreme Court of the State of Illinois is an unwarranted interference with the independence of the judiciary and tends to impair the independence of the judiciary.

7. Whether the tax as applied to a salary of a Judge of the Supreme Court of Illinois is discriminatory and whether the Public Salary Tax Act of 1939 (26 U. S. C., 1940 ed., Sec. 210, p. 2056), on account of its discriminatory character, is unconstitutional as applied to the salary of plaintiff.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The reasons relied on for allowance of the writ are:

1. While the precise question of federal law involved here has been decided in *Collector* v. *Day,* 11 Wall. 113, the Court of Appeals has instead followed the dictum in *Graves* v. *O'Keefe,* 306 U. S. 466. This important question of federal law should be settled in a case in which it is directly in issue.

2. The *obiter* statement of *Graves* v. *O'Keefe* is infected by the misfortune which often vitiates such statements. It was delivered without full argument on both sides. Although the government injected the issue and presumably argued one side of it, yet the State of New York which was seeking to uphold the tax refused to be drawn into the discussion, with the consequence that the adverse view was not argued, or if argued, was not fully and vigorously presented.

3. The dictum of *Graves* v. *O'Keefe* is, with due and profound respect to this tribunal, based in part upon the assumption that the payment of the tax is made out of the private property of the taxpayer and that the origin of the funds in income may be disregarded. This assumption, particularly since the Current Tax Payment Act of 1943, is untrue in fact. It is impossible to say that the income tax is paid out of the private funds of the taxpayer, when the fact is that it is paid by the state which as employer transmits it to the Federal Government; those funds are never received by the taxpayer. The Current Tax Payment Act of 1943 has demonstrated that the factual assumption upon which the dictum of *Graves* v. *O'Keefe* is based is untenable. But even if the assumption were true it would merely justify a direct federal tax and not an income tax.

4. The second assumption of the dictum, that any incidental effect upon the exercise of state governmental functions is so indirect and speculative as to be insubstantial, while it may have had some force as applied to the issue actually then before the court, is unrealistic in the situation presented by this record. The taxation of the salary of a Judge of the Supreme Court of Illinois places a direct burden on an indispensable agency of the State of Illinois; for

(a) The levy of a tax on a salary or wage results in the injection of a third element into the contract which constitutes an interference with the price which the employer must pay for labor.

(b) This interference (which is authorized in private employment but not as to an essential government function) places the employer state, in a position where it must either pay more or accept less competent services. If the state could obtain equally competent services for less pay, it is entitled to that benefit.

(c) The salary of a state judicial officer is fixed by its legislative authority at an amount which is calculated to attract men of high character and standing to the bench. But if that salary is subject to substantial federal taxation, men of ability are discouraged from seeking election to the bench as they cannot there augment their income by increased professional activity as can those who remain in the practice of law.

(d) The imposition of federal taxation creates a tendency to make higher salaries necessary, which of course is an obvious burden on the state.

(e) The distinction between the private funds of the officer and the state governmental funds has been wiped away by the Current Tax Payment Act of 1943, as above observed.

(f) There is a further direct burden on the state since the administration of the income tax withholding provisions is costing the State of Illinois approximately a quarter million dollars annually.

(g) The salary of the person who occupies the office and the performance of its duties are inseparable.

The statutory exemption of interest on state and municipal bonds is in substance a recognition of the principle here presented and constitutes a discrimination against those who perform essential governmental services for the state and in favor of those who loan money for carrying on governmental functions.

(h) The tendency of federal income taxes to increase is apparent and the central government acknowledges no limitation on its power to make further increase. If the tax becomes so burdensome as compared to the advantages of private practice as to compel a judicial officer to resign, not only must the state hold a special election but in the interim is deprived of the services of an incumbent.

(i) The Current Tax Payment Act of 1943 places the direct burden on a state officer to collect the federal taxes from officers and employees of the state. This not only burdens a constitutional officer but is costing the state approximately $250,000.00 each year for extra clerical hire.

5. *Graves* v. *O'Keefe* even in its dictum did not completely overrule *Collector* v. *Day*. It merely overrules the doctrine of *complete* immunity. In the later case of *New York* v. *United States*, 326 U. S. 572, 588, the court recognized that there is still an area in which the federal government cannot tax, namely, when the tax interferes with the performance of the state's functions of government.

To premise that there is no interference with governmental functions in a case such as this is to evade the realities of the situation, and is to assume that the compensation bears no relationship to the quality and fidelity of the services, that it has no bearing upon the type of men who will be attracted to office, and that the financial

cost to the state of being the tax collector is not a burden when in fact it is one.

6. Even if it were the intent of this court to raise the dictum of *Graves* v. *O'Keefe* to the dignity of a rule of law it should be underpinned by a far more secure foundation than an unrealistic argument and an untrue assumption.

7. The dictum under discussion is an unnecessary step in the further centralization of governmental prerogatives. For many years the proper and nice balance of power between the central and the state governments was maintained by the principle enunciated in *Collector* v. *Day* and the other cases with which it was in harmony. We appeal to this court to consider the instant case from the standpoint of protecting the local power of government from encroachment by the vast and all-pervasive power of taxation. That power, while not necessarily the power to destroy, yet certainly carries with it the undoubted possibility of reducing states to servile place in the structure of our government.

8. While this court has considered the taxation of the salary of a judge of the Federal Court in the case of *O'Malley* v. *Woodrough*, 307 U. S. 277, and there held that there was no tendency to destroy the independence of the judiciary where the judge had taken office after the passage of the taxing act, yet this court has never considered this question as applied to taxation by the Federal Government of a Judge of the Supreme Court of a state, and particularly when the salary was not subject to such taxation at the time he took office but became subject to the tax thereafter, and where the state (as here) cannot during the term of office increase the salary to offset the tax.

9. Nor has this court decided the question of the extent to which a state may protect the salary of its constitutional officers from diminution, as the State of Illinois attempted in its Constitution of 1870, Article VI, Section 7, and whether such protection is effective only against the state itself or whether it is also effective against the Federal Government. Or stated differently, whether one of the reserved powers of the state is to retain its own constitution immune from assault by the Federal Government. This important question has not been but should be settled by this court.

10. The Public Salary Tax Act of 1939 is discriminatory in that it amended certain sections of the Revenue Code to include in gross income the compensation of an officer or employee of a state or political subdivision thereof. However, in another section it defined "officer" or "employee" to include members of a legislative body or a judge or officer of the court. By failing to include those in the executive department it is discriminatory in its effect. This question has not been but should be decided by this court.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court is set forth in the Record at page 39.

The opinion of the Court of Appeals appears in 171 F. 2d 36 and in the Record at page 67.

Jurisdiction and Statement.

The basis of jurisdiction and the statement of the case have been set forth above in the Petition (pp. 2-3).

Specification of Errors.

1. The Court of Appeals erred in affirming the judgment of the District Court dismissing the complaint.

2. The Court of Appeals erred in holding the Public Salary Tax Act of 1939 constitutional and non-discriminatory.

3. The Court of Appeals erred in not holding that taxation of petitioner's salary is an invasion of the sovereign power of the State of Illinois and a direct burden upon an indispensable agency of that State.

4. The Court of Appeals erred in not holding that taxation of petitioner's salary was a diminution contrary to Article VI, Section 7 of the Illinois Constitution, is a violation of the constitutional immunity of the State of Illinois from taxation by the federal government, and is an interference with the independence of the judiciary.

Summary of Argument.

This case presents significant and compelling reasons for certiorari. The Court of Appeals based its decision on the dictum of *Graves* v. *O'Keefe,* 306 U. S. 466, which is not and should not be controlling. The question here presented was neither in issue there nor argued. The reasoning of the dictum cannot prevail when re-examined in the light of the instant issues and facts.

ARGUMENT.

I.

SINCE THE QUESTION HERE PRESENTED WAS NOT FULLY ARGUED IN GRAVES v. O'KEEFE, THIS COURT IS ASKED TO CONSIDER THE MATTER AFTER AN ADVERSARY HEARING.

Not since *Collector* v. *Day*, 11 Wall. 113, has the precise question of the taxability of the salary of a Judge of a state court by the federal government been before this tribunal. In the instant case the question is presented even more acutely because petitioner's office is a constitutional one created by the constitution of Illinois, and the case is further distinguished by the fact that when plaintiff was elected in 1938 the salary of that office was not being taxed by the federal government.

It is admitted in the opinion of the Court of Appeals that were *Collector* v. *Day* still controlling, petitioner's right to recovery would be undoubted. It is also the opinion of that court on that point (which sustained the contention of plaintiff) that *Helvering* v. *Gerhardt*, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427, recognized the distinction between employees engaged in essential governmental activities and those who are not, and that even after the *Gerhardt* case it was open to plaintiff to claim that he was performing an essential function of the state government and that therefore the immunity recognized by *Collector* v. *Day* still applied to him.

But that Court deemed that *Graves* v. *O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, had wholly and "clearly terminated the immunity doctrine of *Collector* v. *Day*."

While admitting that the precise question which is here presented was not there involved either on the facts or in principle, that court nevertheless deemed itself bound by what, for the purposes of the instant argument must be regarded as *dictum* in *Graves* v. *O'Keefe*.

While petitioner recognizes the highly persuasive force of an intentional dictum delivered by this eminent tribunal, nevertheless he respectfully asks a reconsideration of the question by this court in this case where the precise question of the taxability of the salary of an officer engaged in an essential constitutional government activity is involved. The reasons for his effort to submit this question to the court are summarized in the foregoing "Reasons Relied on for Allowance of the Writ".

The purpose of this short argument is merely to emphasize certain of those reasons.

In *Graves* v. *O'Keefe* the question was not argued except on one side. The State of New York which was seeking to uphold the State income tax on the salary of a resident of that state which he derived as an examining attorney for the Federal Home Owners' Loan Corporation naturally argued in favor of the validity of the tax. So did the United States. It seems quite apparent that the principle of the *Gerhardt* case would have been sufficient to have determined the issue there involved. The State of New York consequently declined to argue the broader question which was sought to be injected by the government. It was stated by counsel for the State of New York in their brief (p. 468):

> "We note the extended and wholly impertinent argument of the Department of Justice addressed to the proposition that this court should now, in this case, reconsider and overrule *Collector* v. *Day*, 11 Wall. 113, and subsequent cases in line therewith. Since the

> instant case involves no such issue or question; • • • and since the issue thus extraneously raised by the Government's brief will inevitably come before the court in a case where the issue therein may be squarely presented and the vital constitutional questions there involved fully argued and considered—for these reasons the petitioners must decline to be drawn into a discussion of the proposition thus irrelevantly sought to be injected into the instant appeal. For the same reasons we most earnestly trust and pray that this court will adhere to its traditional philosophy of the judicial process and decline the Government's invitation to make the 'digression from the particular case before the court'." 306 U. S. 468.

We believe that this court, now that the precise issue is presented to it, will recognize that it departed from the narrow issues in that case and made statements unnecessary to its decision by heeding the suggestions of the *amicus curiae*. The issue now presented still remains to be decided.

It is the respectful suggestion of petitioner that the question whether the salary of a constitutional officer engaged in an essential governmental function should be taxable by the federal power is one that ought to be examined by this court after a fuller discussion of the two sides of the controversy.

II.

THE DICTUM OF GRAVES v. O'KEEFE RESTS UPON AN INSECURE FOUNDATION.

It is respectfully submitted that, as applying to a constitutional officer performing essential governmental functions, the dictum of *Graves* v. *O'Keefe* cannot be defended or justified on the grounds assigned in that opinion.

In the *obiter* discussion the statement is made that *Collector* v. *Day* assumes that a tax on the salary of the recipient is an interference with the essential governmental function which he performs. The answer is sought to be made that such tax is not paid by the employer government from its funds. "It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it *is paid from his private funds* and not from the funds of the government either directly or indirectly." 306 U. S. 480.

The purpose of that reasoning is to seek justification of taxation such as this by closing the door upon the fact that it was received as income and asserting that it is taken out of the property of the taxpayer. If that is the theory of the tax, it ceases to be an income tax and becomes a general property tax; but Amendment 16 to the constitution authorizes only an income tax.

It is not enough to justify this as a property tax. To do so would place it under different provisions of the Constitution and require different statutory enactments. It would also be subject to certain rules of uniformity not followed in the income tax statutes.

The argument that the tax falls on the private funds of the state judicial officer is effectually eliminated by the Current Tax Payment Act of 1943, which takes the tax directly from the treasury of the state government. The taxpayer does not pay it "from his private funds."

The other basis upon which the pronouncement of *Graves* v. *O'Keefe* is sought to be justified, in so far as it applies to a situation such as this, is that the income tax does not in fact impose a burden upon or interfere with the operation of the state government. Petitioner asks a

reconsideration of that reasoning, as it appears to overlook the realities of the situation. It premises that the amount of salary has no connection with the quality or intensity of the service obtained thereby or with the type of the men who are attracted to public office, in this case, the highest court of the state. Doubtless, there are aspects of public office, particularly judicial office, which supply to a degree the lack of monetary compensation; but even those have their limitations. A person occupying the office of State Supreme Court Judge does not have the opportunity that is afforded a lawyer in private practice who may stimulate his professional activities and overcome to a greater or lesser extent the effects of the federal tax. The judge has no alternative except to accept a smaller net return.

To say that the diminution of the net return after taxes bears no relationship to what the state receives either immediately or in the long run is to deny that there is a relationship between the wage paid and the service received. This flies in the face of all human experience and appears to be a dubious foundation upon which to erect a rule that departs from a principle of law recognized through many decades of American legal history.

Incidentally, it should be noted that the Current Tax Payment Act of 1943 is actually costing the State of Illinois $488,150. per biennium for its administration (Laws of Illinois, 1945, P. 77). This, of course, is something of a burden.

Do not these considerations require a re-examination of this issue, particularly as it applies to a case such as this?

III.

THE EXEMPTION OF INTEREST ON STATE BONDS, WHICH IS ALLOWED BY DECISION AND BY STATUTE, IS A RECOGNITION OF A DOCTRINE OF NON-TAXABILITY WHERE THE BURDEN FALLS ON THE STATE. HERE THE BURDEN IS AS CERTAIN AS THERE, EVEN THOUGH NOT CAPABLE OF THE SAME MATHEMATICAL APPRAISEMENT.

All the early cases in this Court held, and it is now provided by statute, that the interest on state bonds is immune from Federal taxation. (See *Pollock* v. *Farmers Loan and Trust Co.*, 157 U. S. 429). (See particularly discussions at pages 583, 585, 652, 653; and 158 U. S. 601, 630, 693.)

Let us assume then a person other than the plaintiff in this particular case had $750,000. to invest. That he invested it in Illinois 2% bonds. The income therefrom would be $15,000. per annum, all of which would be exempt from federal taxation. The interest on those bonds would be income just as the plaintiff's salary from the state is income. If he invests his service to the state and receives therefor the sum of $15,000. per annum the income springs from the identical source and to tax one whose services bring the income and to exempt another whose investments bring the identical income from the same source constitutes a discrimination which is condemned by the doctrine of inter-governmental immunity.

Perhaps the only difference is that in the case of bonds the burden placed upon the state is capable of ascertainment with more accurate mathematical certainty.* Otherwise there appears to be no difference in substance.

* Illinois has recently sold its long term soldiers' bonus bonds on a 1½ to 2% basis—which should be compared with the 2½% basis of taxable long term governments.

IV.

THIS CASE FALLS WITHIN THAT AREA UPON WHICH THE FEDERAL GOVERNMENT CANNOT ENCROACH WITH THE TAXING POWER.

Graves v. *O'Keefe* appears subject to the construction that only the doctrine of *complete* immunity was overruled. The court did not go so far as to say that every officer or employee and every activity of a state or the federal government would be subject to a tax by the other government. There is a recognition of the existence of some limit on the taxing power in the later case of *New York* v. *U. S.*, 326 U. S. 572. (See especially concurring opinion of Mr. Justice Stone at page 588.) If there is any limit it would seem that the power of taxation should stop short of taxing the salaries of constitutional state officers who perform a most fundamental state governmental function.

In view of the fact that the salary paid and the net return to the public official does bear a relationship to the character and extent of the services rendered, and that the situation does have an effect upon the kind of men who will be attracted to office, and that a burden is placed upon the state by making it a tax collector for the national government, it is respectfully suggested that the limitations implied in the New York case should prohibit the imposition of the tax in the situation presented by this record.

V.

THIS COURT HAS NOT HERETOFORE CONSIDERED A CASE IN WHICH A FEDERAL TAX IMPAIRS A STATE CONSTITUTIONAL PROVISION THAT SETS UP ESSENTIAL STATE FUNCTIONS.

While *O'Malley* v. *Woodrough*, 307 U. S. 277, seems to establish the taxability of the salary of a federal judge who took office after the enactment of the taxing statute, that case does not cover the facts of this one where the state constitution (Constitution of Illinois, Article VI, Section 7) prohibits the increase or diminution of the salary of a judge.

The Illinois Constitution has since 1870 contained this provision. It is part of the fundamental law of that state. The state itself has not sought to diminish the salary. The effect of the federal statute, however, is to bring about that result. Consequently it overrides the constitutional provisions of the state.

Certainly the states have nowhere delegated to the federal government power to override their constitutions insofar as they set up the indispensable functions of state government. Of course, if the states were to delegate the power to impair their constitutions, that result could be brought about by the federal power; but in the absence, as here, of a clear delegation of that authority, the Tenth Amendment inhibits the partial destruction of the state constitution which follows from this tax in this case.

Here a federal statute impinges upon and impairs the constitution of a state. The facts in *Florida* v. *Mellon*, 273 U. S. 12, 47 S. Ct. 265, 71 L. Ed. 511, are obviously distinguishable. There the state sought to enjoin a federal statute because the practical effect of a constitutional pro-

vision of Florida prohibited citizens of that state from obtaining credit for a state inheritance tax deduction. Here, however, the federal statute directly strikes down a pre-existing constitutional provision of the state which has nothing to do with taxation but merely with the retention intact of the compensation paid to a constitutional officer.

This question has not been considered by this court in a comparable case and is of such importance as in the opinion of petitioner requires a pronouncement by this court.

As stated by Mr. Justice Douglas in his dissent in *New York* v. *United States,* 326 U. S., at 594, "* * * the power to tax lightly is the power to tax severely. The power to tax is, indeed, one of the most effective forms of regulation. And no more powerful instrument for centralization of government could be devised." And on the next page he states, "If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have. They are relegated to a more servile status. They become subject to interference and control both in the functions which they exercise and the methods which they employ."

VI.

THE PUBLIC SALARY TAX ACT OF 1939 IS DISCRIMINATORY AND VOID.

On its face the Public Salary Tax Act of 1939 (26 U. S. C. 1940 ed., Sec. 210, p. 2056), clearly appears to be discriminatory. It amended certain sections of the Revenue Code to include in gross income the compensation of an officer or employee of a state or political subdivision thereof. In another section it defined "officer" or "employee" to include members of a legislative body and a

judge or officer of a court. By failing to include those in the executive department it is discriminatory in its effect. (26 U. S. C., 40 Ed., pages 2053 and 2056.)

The Court of Appeals sought to overcome this obvious discrimination by reliance on a treasury rule. It is submitted that only an ambiguity and not a substantive omission from the statute can be cured by rule. Because of this discriminatory provision the tax is invalid even if all other contentions were overruled.

Conclusion.

Petitioner prays for the issuance of the writ in order that the court may re-examine the application of *Graves* v. *O'Keefe* and the basis upon which that case was decided.

The imposition of this tax undoubtedly constitutes a basic step in the dissolution of the powers of the states. This case presents issues completely different from those that were before this court in *Graves* v. *O'Keefe,* upon which the decision of the Court of Appeals is founded.

The reasons hereinbefore outlined constitute, we submit, grounds for a consideration by this court of this important question which has not been, but should be, settled by this court.

For the reasons set forth in this brief, petitioner respectfully asks that this court grant its writ of certiorari and that the judgment appealed from be reversed.

Respectfully submitted,

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 546

WALTER T. GUNN, PETITIONER

v.

VINCENT Y. DALLMAN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE 8TH COLLECTION DISTRICT OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 39-41) is reported in 72 F. Supp. 617. The opinion of the Circuit Court of Appeals (R. 67-70) is reported in 171 F. 2d 36.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1948. (R. 71.) The peti-

tion for a writ of certiorari was filed on February 5, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether the imposition of federal income taxes on the salary received by petitioner as a judge of the Supreme Court of Illinois violates the Federal Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Internal Revenue Code:

> SEC. 22 [as amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574]. Gross Income.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *. (26 U. S. C. 1946 ed., Sec. 22.)

Public Salary Tax Act of 1939, c. 59, 53 Stat. 574:

> SECTION 1. Section 22(a) of the Internal Revenue Code (relating to the definition of

"gross income") is amended by inserting after the words "compensation for personal service" the following: ("including personal service" as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing").

SEC. 210. For the purposes of this Act, the term "officer or employee" includes a member of a legislative body and a judge or officer of a court.

Constitution of the United States:

ARTICLE I

* * * * * * *

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be Uniform throughout the United States; * * *

* * * * * * *

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall

not be diminished during their Continuance in Office.

SIXTEENTH AMENDMENT

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Jones, Illinois Statutes Annotated (1934):

Illinois Constitution, Article VI

SECTION 7. From and after the adoption of this Constitution, the judges of the supreme court shall each receive a salary of * * *, payable quarterly, until otherwise provided by law. And after said salaries shall be fixed by law, the salaries of the judges in office shall not be increased or diminished during the terms for which said judges shall have been elected.

STATEMENT

The essential well-pleaded facts alleged in the complaint are these:

The petitioner, hereinafter called the taxpayer, is and has been since July 1, 1938, a judge of the Supreme Court of Illinois. (R. 3.) During the years 1939 through 1944, he received $15,000 annually as his salary, pursuant to Illinois statute. (R. 3, 6, 7, 9, 10.)

The taxpayer paid under protest the federal income taxes imposed on the salary so received either on demand of the United States, together with the filing of the federal income tax returns, or by with-

holding from his salary by the Treasurer of the State of Illinois which was paid over to the Collector under the Current Tax Payment Act of 1943. (R. 3, 6, 7, 8-9, 10.) The taxpayer filed claims for refund and brought this suit for the recovery of the income taxes paid on the ground that the imposition of such taxes was unconstitutional. (R. 5, 6, 7, 9, 11.)

The respondent moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. (R. 39.) The motion was allowed, and when the taxpayer elected to stand on the complaint, judgment was entered for the respondent. (R. 42-43.) The Court of Appeals affirmed. (R. 71.)

ARGUMENT

The taxpayer's salary is includible in his taxable gross income in accordance with the Public Salary Tax Act of 1939, which amended the definition of gross income under Section 22(a) of the Internal Revenue Code to include the compensation of "an officer or employee of a State", and which defined the term "officer or employee" so as to include a "judge or officer of a court".[1]

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[1] Public Salary Tax Act of 1939, Secs. 1 and 210. There is nothing in this amendment, its legislative history, or the administrative interpretation to justify the taxpayer's assertion (Pet. 9) that the Act did not include the compensation of the officers and employees of the executive branch of the state within the taxable gross income under Section 22(a) of the Internal Revenue Code. H. Doc. No. 113, 76th Cong., 1st Sess.; H. Rep. No. 26, 76th Cong., 1st Sess. (1939-2 Cum. Bull. 487); H. Conference Rep. No. 390, 76th Cong., 1st Sess. (1939-2 Cum. Bull.

The contention that Congress was without power under the Constitution to impose the tax is without merit. The contrary view, reflected in *Collector* v. *Day*, 11 Wall. 113, has since been thoroughly discredited in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, and nothing presented in the petition herein calls for further consideration of this question. Nor is any distinction to be drawn by reason of the fact that taxpayer is a judge. Cf. *O'Malley* v. *Woodrough*, 307 U. S. 277.

Every substantial question presented by this petition was decided below in accord with controlling decisions of this Court. It is respectfully submitted that none of these decisions warrant reexamination, and the petition should, therefore, be denied.

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MARCH, 1949.

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502); S. Rep. No. 112, 76th Cong., 1st Sess. (1939-2 Cum. Bull. 491); and Treasury Regulations 103, Sec. 19.22(a)-2, Treasury Regulations 111, Sec. 29.22(a)-2, both promulgated under the Internal Revenue Code. Hence, there is no foundation for the alleged discrimination.

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